

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish loss of hearing in his left ear due to employment-related noise exposure.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

On July 8, 2008 appellant, then a 50-year-old mail handler and equipment operator, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to noise exposures during his federal employment. He submitted medical evidence in support of his claim from Dr. Laura L. Downey, a Board-certified otolaryngologist, dated May 8, 2008. Dr. Downey found that appellant experienced a sudden onset of sensorineural hearing loss in November 2007 which was not due to tumor or infection. Appellant's audiogram improved from a profound left hearing loss to a severe left hearing loss. Dr. Downey opined that his employment was negatively impacting his recovery as his unilateral hearing loss was aggravated by loud sounds and open areas.

On June 5, 2008 Dr. Sarita Kaza, a Board-certified otolaryngologist, reported that appellant developed a sudden left-sided hearing loss in December 2007. She indicated that he was treated with steroids without significant improvement and that no known cause of sudden hearing loss was identified. Dr. Kaza noted appellant's concern that his hearing loss may be somewhat related to his noisy work environment. She reviewed his audiogram and found that his hearing loss pattern on the right was consistent with loss due to noise exposure. Dr. Kaza opined, "I suspect that [appellant] had some baseline hearing loss prior to the sudden hearing loss that he developed in December [2007]. This baseline hearing loss may have been due to noise exposure."

OWCP referred appellant for a second opinion evaluation with Dr. Chong S. Kim, a Board-certified otolaryngologist. In a report dated November 24, 2008, Dr. Kim reviewed the statement of accepted facts (SOAF) as well as appellant's recollection that he had a rather sudden onset of hearing loss in November 2007, which happened overnight and was associated with dizziness. He reported that appellant had normal hearing at the beginning of his employment and was exposed to significant noise at the employing establishment. Dr. Kim diagnosed hearing loss. He noted that appellant had a currently nonfunctioning ear on the left and mild-to-moderate sensorineural hearing loss of the right. Dr. Kim opined that, due to the suddenness of appellant's loss of hearing in his left ear, this condition was not due to employment-related noise exposure, but to an idiopathic condition which was not uncommon in patients with diabetes mellitus. He concluded that appellant's hearing loss in the right ear was noise-induced from his employment noise exposures.

By decision dated December 11, 2008, OWCP accepted appellant's claim for sensorineural hearing loss on the right. It did not accept his hearing loss in the left ear. On

³ Docket No. 14-1210 (issued September 16, 2015); Docket No. 10-2063 (issued July 15, 2011).

November 23, 2009 OWCP granted appellant a schedule award for 13 percent permanent impairment of his right ear due to hearing loss.

In a letter dated December 5, 2009, counsel requested reconsideration of the December 11, 2008 decision and argued that appellant's claim should include hearing loss in the left ear. In a note dated May 29, 2008, Dr. Downey described appellant's left ear treatment including Decadron injections which resulted in 20 percent impairment. She concluded, "The sensorineural hearing loss which is profound in one ear is aggravated by [appellant's] employment because he works in a very loud environment." Dr. Downey also opined that the loud work environment may have resulted in hearing loss in the right ear.

On May 6, 2010 Dr. Downey noted appellant's noise exposure at work and found no family history of hearing loss or previous ear disease. She reported that his hearing loss was normal at the onset of his employment and that his hearing on the left was currently unaidable, while his hearing in his right ear was significant.

In an August 17, 2010 merit decision, OWCP found that Dr. Kim's report was entitled to the weight of the medical evidence and denied modification of its prior decision finding no employment-related loss of hearing in the left ear.

Appellant appealed to the Board. The Board reviewed this case on July 15, 2011⁴ finding a conflict of medical opinion evidence between Drs. Downey and Kaza, for appellant, and Dr. Kim, for OWCP, and remanded the case to OWCP to refer appellant, a SOAF, and a list of specific questions to a Board-certified otolaryngologist to determine if his loss of hearing in the left ear was related in any degree to his accepted employment-related noise exposure and if so, whether there was any permanent impairment.

Following the Board's decision, OWCP referred appellant, a SOAF, and a list of specific questions for an impartial medical examination with Dr. Anthony DeGennaro, a Board-certified otolaryngologist. In a report dated October 25, 2011, Dr. DeGennaro reviewed appellant's history of noise exposure and his medical history included in the SOAF. He performed a physical examination of appellant's ears, nose and throat which demonstrated boggy swollen turbinates, but was otherwise normal. Dr. DeGennaro diagnosed a mixed hearing loss in the left ear manifested by a 25 decibel air-bone gap, primarily in the lower mid-frequency range with absent stapedial reflexes. He noted that the findings were consistent with bilateral hearing loss. Dr. DeGennaro opined that appellant's left ear was affected to a greater degree due to a conductive overlay presumed to be secondary to otosclerosis as there was no history of trauma. He concluded that, "There are no findings on the audiometric testing which would connote an indirect hearing loss, due to [appellant's] occupation specifically."

By decision dated November 17, 2011, OWCP denied appellant's claim for loss of hearing in the left ear. It found that Dr. DeGennaro established that appellant's left ear hearing loss was not related to his work.

⁴ Docket No. 10-2363 (issued July 15, 2011).

Counsel requested an oral hearing before an OWCP hearing representative on November 22, 2011. Appellant testified at the oral hearing on February 14, 2012. He noted that he required a hearing aid for his left ear and that his physician would review Dr. DeGennaro's report.

Dr. Bruce A. Edelman, a Board-certified otolaryngologist, completed a report on February 27, 2012 and noted appellant's history of asymmetric sensorineural hearing loss and significant noise exposure at work. He noted appellant's significant asymmetric discrimination and the issues of whether appellant had conductive component in his left ear and otosclerosis. Dr. Edelman noted appellant's concurrent conditions of hypertension and diabetes. He found that both ears showed some sclerosis of the eardrums consistent with chronic inflammation of the eardrums over his lifetime. Dr. Edelman reviewed an audiogram which demonstrated an asymmetric sensorineural hearing loss and diagnosed this condition. He noted that appellant's asymmetrical hearing loss with severe hearing loss on the left was sudden, based on Dr. Downey's reports, and did not respond to aggressive medical management. Dr. Edelman found that there was no significant conductive component to appellant's hearing loss. He opined, "There is no question that [appellant] might have a high frequency sensorineural hearing loss ... secondary to noise exposure. I do not have a good explanation for his left-sided hearing loss. Whether there is any noise-induced hearing loss cannot be determined if [appellant] had a severe asymmetric loss which was relatively sudden in nature."

Dr. Downey completed a report on March 4, 2012 and found deficiencies in Dr. DeGennaro's report. She noted that appellant had severe-to-profound sensorineural loss on the left ear. Dr. Downey noted, "It is impossible to determine if there is an air-bone gap as bone conduction is vibrotactile at that level." She noted that appellant had poor discrimination on the left ear. Dr. Downey opined that poor discrimination was not consistent with otosclerosis and therefore unlikely to be the primary cause of the left ear neural loss which was not congenital.

By decision dated April 30, 2012, the hearing representative found that Dr. DeGennaro's report was entitled to the special weight of the medical opinion evidence and was sufficiently well rationalized to establish that appellant's left ear hearing loss was not causally related to his employment.

In a letter dated May 14, 2013, counsel noted that he had requested reconsideration on May 10, 2012. He included a copy of this request and submitted the reports from Dr. Edelman dated February 27, 2012 and Dr. Downey dated March 4, 2012. The initial request for reconsideration was dated May 10, 2012. On December 19, 2013 counsel asked when a decision on his reconsideration requests would be issued. He again asked when his reconsideration requests would be addressed on March 26, 2014.

By decision dated April 8, 2014, OWCP denied appellant's requests for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Appellant again appealed to the Board. In a September 16, 2015 decision, the Board affirmed the April 8, 2014 OWCP decision.⁵ The Board found that the copy of the May 10, 2012 document labeled reconsideration was not evidence that the document was received by OWCP. The Board concluded, "The

⁵ Docket No. 14-1210 (issued September 16, 2015).

record, at most, establishes that the document was prepared on that date. Thus it is insufficient evidence to establish that a reconsideration request in this case was timely filed.” The Board further found that appellant had not demonstrated clear evidence of error on the part of OWCP.

Following the Board’s September 16, 2015 decision, counsel requested reconsideration on April 19, 2016. He asserted that the record contained a timely request for reconsideration dated May 10, 2012 and marked as received by OWCP on May 14, 2012. Counsel asserted that this document was in the record at the time of OWCP’s and the Board’s decisions and required review of the merits.

By decision dated November 18, 2016, OWCP reviewed the merits of appellant’s claim and found that Dr. Downey’s March 4, 2012 report failed to provide a rationalized medical explanation regarding the very different patterns of loss of hearing in the left and right ears and how both were caused by noise exposure. It further found that Dr. Edelman’s February 27, 2012 report indicated that he did not have a good explanation for appellant’s left-sided hearing loss. OWCP found that the additional medical evidence was not sufficient to create a conflict with Dr. DeGennaro’s report and denied modification of the prior merit decision.

LEGAL PRECEDENT

OWCP’s regulations define an occupational disease as “a condition produced by the work environment over a period longer than a single workday or shift.”⁶ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving

⁶ 20 C.F.R. § 10.5(q).

⁷ 5 U.S.C. § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁹

A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.¹⁰ Medical rationale includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment activity or factors identified by the claimant.¹¹ The belief of a claimant that a condition was caused or aggravated by the employment is insufficient to establish causal relation.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish loss of hearing in his left ear due to employment-related noise exposure.

The Board previously found a conflict of medical opinion between appellant's physicians' Dr. Downey and Dr. Kaza, and OWCP's referral physician, Dr. Kim which required referral to an impartial medical examiner, Dr. DeGennaro, a Board-certified otolaryngologist.

Dr. DeGennaro based his October 25, 2011 report on a proper history of injury referencing the SOAF, appellant's history of noise exposure, and his medical history. He diagnosed a mixed hearing loss in the left ear which was manifested by a 25 decibel air-bone gap with absent stapedial reflexes. Dr. DeGennaro opined that appellant had binaural hearing loss. He found that the increased hearing loss of appellant's left ear was due to a conductive overlay secondary to otosclerosis. Dr. DeGennaro concluded that appellant's audiogram did not support an indirect loss of hearing due to employment-related noise exposure.

The Board finds that Dr. DeGennaro's report is sufficiently detailed and well reasoned to resolve the existing conflict of medical opinion evidence. Dr. DeGennaro relied on the SOAF, provided findings on physical examination, and explained why appellant's loss of hearing on the left was due to otosclerosis rather than to noise exposure in the performance of his federal job duties.¹³ This report does not support appellant's occupational disease claim for hearing loss on the left due to noise exposure.

⁹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

¹⁰ *T.F.*, 58 ECAB 128 (2006).

¹¹ *A.D.*, 58 ECAB 149 (2006).

¹² *Lourdes Harris*, 45 ECAB 545, 547 (1994).

¹³ *K.B.*, Docket No. 13-0443 (issued May 10, 2013).

Following Dr. DeGennaro's October 25, 2011 report, appellant submitted an additional report from Dr. Downey. On March 4, 2012 she reviewed the October 25, 2011 report, and disagreed with his findings and conclusions. Dr. Downey opined that it was impossible to determine the air-bone gap in appellant's left ear. She also noted that he had poor discrimination on the left ear and opined that poor discrimination was not consistent with Dr. DeGennaro's diagnosis of otosclerosis. Dr. Downey, although in disagreement with Dr. DeGennaro is not sufficient to create an additional conflict of medical opinion evidence as she did not provide sufficient explanation and reasoning in support of her contrary conclusions.¹⁴ A medical opinion that states a conclusion, but does not offer any rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁵ Furthermore, as Dr. Downey was on one side of the conflict that Dr. DeGennaro resolved, the additional report from Dr. Downey is insufficient to overcome the special weight accorded Dr. DeGennaro's report as the impartial medical specialist or to create a new conflict with it.¹⁶

Appellant also submitted a report from Dr. Edelman dated February 27, 2012. He found that both ears showed some sclerosis of the eardrums consistent with chronic inflammation of the eardrums over his lifetime. Dr. Edelman noted that appellant's asymmetrical hearing loss on the left was sudden. He concluded that he could not determine if appellant had noise-induced hearing loss on the left due to the sudden nature of appellant's hearing loss on the left. An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.¹⁷ The Board finds that Dr. Edelman's report does not support appellant's claim for employment-related hearing loss on the left.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish loss of hearing in his left ear due to employment-related noise exposure.

¹⁴ *Dennis A. Ricci*, Docket No. 02-0588 (issued August 28, 2002).

¹⁵ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *supra* note 11.

¹⁶ *K.R.*, Docket No. 16-0542 (issued December 21, 2016); *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

¹⁷ *R.W.*, Docket No. 15-0345 (issued September 20, 2016); *Robert A. Boyle*, 54 ECAB 381 (2003).

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board